In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1093

THEODORE R. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor's comments during closing argument denied him a fair trial.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

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[1]Petitioner and Larry Holman were initially charged in a five-count indictment alleging various narcotics offenses. Petitioner was acquitted on the four other counts, and upon Holman's plea of guilty to one count the other charges against him were dismissed prior to trial.

The evidence at trial established that on September 8, 1973, Agent Charles Story of the Drug Enforcement Administration and a government informant went to the apartment of Larry Holman in Washington, D.C., to purchase narcotics (Tr. 70-71). When they arrived, petitioner was seated at a table placing quantities of brown powder from a "cutting board" into foil packets (Tr. 71-73). The agent, the informant, and Holman sat at the table with petitioner and engaged in a general discussion of narcotics trafficking (Tr. 72). During this conversation Holman permitted the agent to examine a large plastic bag containing about nine ounces of heroin, which he offered to sell at a cost of $3,000 per ounce (Tr. 28-30, 73-74).

After the agent agreed to buy six "spoons" of the heroin for $1,500, petitioner prepared the heroin by grinding it in an electric coffee grinder, filtering it through a tea strainer, and packaging it in foil packets (Tr. 74-76). Petitioner also mixed an additional quantity of heroin with some lactose and placed that mixture in a second foil packet (Tr. 76-77). Petitioner then gave the two foil packets of heroin to the agent in exchange for $1,500. After petitioner counted the purchase money the agent left the apartment with the heroin (Tr. 77-78).

1. Petitioner asserts (Pet. 9-11) that the prosecutor improperly commented on his failure to testify when during closing argument he remarked, without objection, that petitioner had some narcotics "in front of him" which "were right under Mr. Holman's nose, and Mr. Holman is not here to contest it" (Tr. 364).[2] Petitioner

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[2]Holman had indicated to the court, out of the presence of the jury, that if called to the stand he would invoke his Fifth Amendment privilege, and he was therefore not called to testify at trial (Tr. 320-323).

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did not make this argument in the court of appeals and thus the issue is not properly presented for review here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, petitioner did not object to the prosecutor's remark at trial, and it was certainly not "plain error" under Rule 52(b), Fed. R. Crim. P., for the district court to have failed *sua sponte* to have cautioned the jury that a remark referring only to the absence of a possible defense witness should not be construed as a reference to the defendant's failure himself to testify.

2. Petitioner claims (Pet. 11-14) that the prosecutor's closing argument included various other improper comments and misrepresentations.

a. Contrary to petitioner's first assertion (Pet. 13), the prosecutor's statement that petitioner had "a couple of very, very expensive cars * * * at the time" (Tr. 363-364) was directly supported by testimony that established petitioner's use and ownership of two Cadillac automobiles at the time of the offense (Tr. 113-114, 138-139).

b. Petitioner claims (Pet. 13-14) that the prosecutor misrepresented the evidence in stating, without objection, that both Holman and petitioner wanted the agent and the informant to leave Holman's residence because they had customers arriving (Tr. 364), but this claim was not presented to the court below and accordingly is not properly raised here. *Adickes* v. *S. H. Kress & Co.*, *supra*. In any event, even if the prosecutor's comment did not precisely reflect the trial testimony, it amounted to harmless error at most, given the evidence showing that Holman and petitioner were jointly operating a narcotics distribution enterprise (Tr. 79).

c. There is no basis in the record for petitioner's claim (Pet. 14) that despite the court's contrary instruction the prosecutor directed the jury's attention to an attempted drug purchase at Holman's apartment subsequent to the transaction underlying petitioner's conviction. The prosecutor merely mentioned that the agent who purchased the heroin from petitioner had visited Holman's apartment on "several occasions," as the evidence presented at trial clearly established (Tr. 83, 105, 365); no reference was made to other narcotics sales, aborted or otherwise.

d. Finally, there is no substance to petitioner's claim (Pet. 14) that he was prejudiced by the prosecutor's brief reference to expert testimony concerning the use of the implements petitioner used to prepare and package the heroin sold to the undercover agent. Even if this reference had been improper,[3] there could have been no prejudice to petitioner under the trial court's careful instruction to the jury regarding the proper utilization of the expert's testimony (Tr. 387). In any event, this contention also was not made in the court below, and therefore it, too, is not properly presented for review in this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]While the trial court's final instructions to the jury indicated that the jury was to consider the expert's testimony only as it related to the value of the heroin sold by petitioner (Tr. 387), his ruling during trial did not specifically exclude the testimony referred to in the prosecutor's argument (Tr. 240-241).

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